Supreme Court U.S.
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In The

Supreme Court of the United States

FRANCO HERRERA-AGUILAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the district court violated the Sixth Amendment right to a jury trial because it adjusted or enhanced the Petitioner's sentence through a preponderance of the evidence standard based on his alleged role, and made a factual determination as to the amount of drugs involved in the offense by the same standard, without submitting the issue to the jury to be determined beyond a reasonable doubt. This issue is of national importance because it is an error of constitutional magnitude, and thus all defendants rights are implicated by the decision in this case. Certiorari should therefore be granted.

LIST OF PARTIES

Petitioner Franco Herrera-Aguilar

Co-defendant Sigifredo Saucedo

Co-defendant Luis Arana Aguilar

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below, where the Eleventh Circuit Court of Appeals held that:

1. The government met its burden to prove Herrera-Aguilar's managerial role by a preponderance of the evidence, and the district court did not reversibly err in its calculation of the drug amount attributed to the Petitioner. App. 7-8.

OPINION BELOW

The Opinion of the Eleventh Circuit appears at Appendix 1 to the petition and is unpublished. The Judgment of the United States District Court appears at Appendix 2 to the petition and is unpublished. The Eleventh Circuit Order denying the Petition for Rehearing appears at Appendix 3 to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Eleventh Circuit decided this case was September 29, 2006. App. 1. A Petition for Rehearing was denied on December 5, 2006. App. 21. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves several statutory provisions and sections of the United States Sentencing Guidelines. The content of these relevant provisions and sections are as follows:

28 U.S.C. § 1254(1) provides in relevant part that:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree . . .

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

21 U.S.C. § 841(a)(1) provides that:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 841(b)(1)(A)(viii) provides in relevant part:

(b) Penalties.

. . . any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment,

> a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420 [21 USCS §§ 849, 859, 860, or 861] after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

21 U.S.C. § 846 provides that:

> Any person who attempts or conspires to commit any offense in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

U.S.S.G. § 3B1.1(b) provides a 3 level increase in the defendant's offense level for aggravating role if . . . "the

defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive . . . "

U.S.S.G. § 3E1.1(a) and (b) provide that:

> (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
>
> (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

Petitioner Franco Herrera-Aguilar, Sigifredo Saucedo, and Luis Arana Aguilar were named in a two count Indictment in the Middle District of Florida, at Tampa, on April 10, 2003. Presentence Investigation Report ("PSI") PSI-1. R. 1. Count One of the Indictment charges that between an unknown date, which was at least in or about June, 2001, and continuing through on or about March 5, 2003, Herrera-Aguilar and Saucedo conspired to distribute 500 grams or more of methamphetamine, contrary to 21 U.S.C. § 841(a)(1),

and in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(viii). PSI-1. R. 1-1.

On January 6, 2005, the defendant entered a plea of guilty without a written plea agreement before the United States Magistrate Judge Thomas B. McCoun III. PSI-1. R. 137. On January 20, 2005, United States District Judge Richard A. Lazzara accepted the defendant's plea and adjudicated him guilty. PSI-1. R. 112.

Herrera-Aguilar was sentenced guilty to count one of the Indictment on April 8, 2005. R. 126. The sentence was calculated by taking a base offense level of 38, with an adjustment for role in the offense pursuant to U.S.S.G. § 3B1.1 of 3, a 2 level adjustment for obstruction of justice, for an adjusted offense level of 43. R. 126-33; PSI-3-4. With a 2 level downward adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a), and a 1 level downward adjustment for timely notification of intent to plead guilty pursuant to U.S.S.G. § 3E1.1, the total offense level was 40. R. 126-33; PSI-4. With a criminal history category of 1, Herrera-Aguilar's guidelines range was 292 to 365 months imprisonment. R. 126-34.

However, Franco Herrera-Aguilar pled, and was, the Petitioner asserts, only found guilty of conspiring to possess with intent to distribute 500 grams or more of methamphetamine. R. 137-8. Herrera-Aguilar also objected to the sufficiency of the evidence to support his sentence, the amount of drugs attributed to him, and his role in the offense. PSI – Amended Addendum; R. 126-4-7; 32; 39.

In addition, during sentencing, the Petitioner requested that the Court consider giving him a sentence below the guidelines. R. 126-35. The Court still sentenced

Mr. Herrera-Aguilar to a guidelines sentence of 292 months, or 24 and ⅓ years, however. R. 126-37. In sharp contrast, co-Defendants Luis Arana Aguilar and Sigifredo Saucedo received radically shorter sentences of 37 months and 46 months, respectively. PSI – Preface. R. 53; R. 47.

Notice of Appeal was filed on April 15, 2005. R. 117. Herrera-Aguilar filed an Appeal on May 25, 2006. The government filed its response on June 27, 2006. The Petitioner filed a Reply Brief on July 19, 2006.

The Eleventh Circuit Court of Appeals subsequently ruled against the Petitioner on September 29, 2006. App. 1. A Petition for Rehearing filed by Herrera-Aguilar was denied on December 5, 2005. App. 21. The Petitioner is incarcerated pursuant to the sentence imposed.

B. Statement of the Facts

Herrera-Aguilar pled, and was, the Petitioner asserts, found guilty of conspiring to possess with intent to distribute 500 grams or more of methamphetamine. R. 137-8. Accordingly, Herrera-Aguilar's base offense level should have been 32, based on an admission of dealing 500 or more grams of methamphetamine. U.S.S.G. § 2D1.1. PSI-1. R. 126-3. However, the Petitioner's base offense level was calculated based on an alleged amount of 29.05 kilograms of methamphetamine. PSI-3. Thus, his base offense level in the PSI was 38, instead of 32. PSI-3.

During sentencing, the Judge misstated the amount that Herrera-Aguilar was accused of dealing by saying it was 59.05 kilograms of methamphetamine. R. 126-4. Thus, the sentencing Judge was erroneously laboring under the impression that the amount of drugs attributed to the

Petitioner was more than double the amount of 29.05 kilograms erroneously attributed to Herrera-Aguilar by the probation officer, and objected to by Herrera-Aguilar. PSI-3; R. 126-4. In its Order, the Eleventh Circuit held that the sentencing Judge did not commit plain error when making this misstatement, however. App. 8, footnote 2.

Counsel for the Petitioner duly objected to the amount of 29.05 kilograms of methamphetamine used by the probation officer to calculate the Petitioner's base offense level. Amended Addendum to PSI. The Petitioner also objected to an enhancement for his role in the offense. PSI Amended Addendum.

Specifically, the PSI Report states that: "the government can provide testimony to substantiate the information contained in the offense conduct section of the report." PSI – Amended Addendum. During sentencing, however, Lakeland Police Officer Glenn P. James testified as the only government witness. R. 126-11-31. As argued in Herrera-Aguilar's Appeal and Reply Brief, this police officer repeatedly testified as to matters of which he had no direct knowledge, and this testimony should have been excluded as inadmissible hearsay. The unavailability of the witnesses for whom James was allegedly speaking, and who it is not clear that he ever even met, was also never established.

Defense counsel thus objected to all of this police officer's testimony on hearsay grounds. R. 126-22. Defense counsel also objected that the case against the Petitioner, to the length and depth alleged by the government, had not been sufficiently proven. R. 126-32. The attorney for the Petitioner later renewed his objections. R. 126-39. In

addition, the Petitioner's sentence was raised or enhanced by findings of fact as to role and drug amount made by the sentencing Judge under a preponderance of the evidence standard.

STANDARD OF REVIEW

The Sixth Amendment jury-trial guarantee prohibits a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). "The relevant 'statutory maximum,'" this Court has clarified, "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S., at 303-304, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (emphasis in original). "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Cunningham v. California*, 127 S. Ct. 856, 868, 166 L. Ed. 2d 856 (2007).

SUMMARY OF THE ARGUMENT

The Petitioner pled guilty to a count of an indictment that charged that between an unknown date, which was at least in or about June, 2001, and continuing through on or about March 5, 2003, Herrera-Aguilar and Saucedo conspired to distribute 500 grams or more of methamphetamine, contrary to 21 U.S.C. § 841(a)(1), and in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(viii). PSI-1. R. 126-3. Herrera-Aguilar objected to the amount of drugs, 29.05 kilograms, or 59.05 kilograms, as misstated by the Judge, attributed to him in the PSI Report. PSI – Addendum; R. 126-4-7; 32; 39.

U.S.S.G. § 3B1.1(b) provides a 3 level increase in the defendant's offense level for aggravating role if . . . "the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive . . ." U.S.S.G. § 3B1.1(b). The Petitioner objected to an enhancement for his role in the offense. PSI Amended Addendum.

Even assuming, for the sake of argument, that there was sufficient evidence to support findings as to alleged drug amount and the Petitioner's alleged role in the offense, Herrera-Aguilar was sentenced by a Judge under the preponderance of the evidence standard. The sentencing Judge found that the Petitioner had dealt 29.05 kilograms or more of methamphetamine, substantially more than the 500 grams or more to which he had pled guilty. This raised his base offense level from 32 to 38. The sentencing Judge also adjusted the offense level upward by 3 points for the Petitioner's alleged role in the offense.

Neither of these two findings of fact were submitted to a jury nor proven beyond a reasonable doubt.

With additional findings by the sentencing Judge under this preponderance of the evidence standard about drug amount and the Petitioner's alleged role in the offense, Herrera-Aguilar's guidelines range was raised from a range of 108 to 135 months imprisonment to a range of 292 to 365 months imprisonment. The facts exposing the Petitioner to this greater potential sentence were not found by a jury and established beyond a reasonable doubt, but merely by a preponderance of the evidence. Thus the Petitioner's Sixth Amendment jury trial rights have been violated by the sentencing procedure.

This issue is of national importance because it is an error of constitutional magnitude, and thus all defendants' rights are implicated by the decision in this case. Certiorari should therefore be granted.

ARGUMENT

I. THE SENTENCING COURT, CALCULATING THE AMOUNT OF DRUGS TO BE ATTRIBUTED TO THE PETITIONER AND HIS ALLEGED ROLE IN THE OFFENSE BY THE PREPONDERANCE OF THE EVIDENCE STANDARD, VIOLATED THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY AND PROOF BEYOND A REASONABLE DOUBT

During sentencing, the government was held to have established the drug quantity by a preponderance of the evidence. The sentencing Judge also increased the Petitioner's sentence by 3 levels for aggravating role pursuant

to U.S.S.G. § 3B1.1(b). R. 126-33. The Eleventh Circuit Court of Appeals upheld these findings, and affirmed the sentence. App. 1-9.

As argued in the Appeal and Reply Brief, although Herrera-Aguilar pled guilty, and knew co-Defendants Sigifredo Saucedo and Luis Arana Aguilar, there are a variety of people listed in the PSI report as being related in the sense of other Indictments being brought against them that the Petitioner does not even know. R. 126-5. As argued in the aforementioned briefs, the Petitioner should not be held responsible for any drug transaction in which these other people were involved. R. 126-5.

In addition, U.S.S.G. § 3B1.1(b) provides a 3 level increase in the defendant's offense level for aggravating role if . . . " the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive . . . " U.S.S.G. § 3B1.1(b). In his Appeal and Reply Brief, Herrera-Aguilar argued that there clearly was insufficient evidence linking Herrera-Aguilar to five or more other co-conspirators or an extensive conspiracy in which he was a manager or supervisor. Accordingly, the Petitioner concluded, there was insufficient evidence for an aggravating role enhancement pursuant to U.S.S.G. § 3B1.1(b).

Even assuming, for the sake of argument, that there was sufficient evidence to support these findings, however, Herrera-Aguilar was sentenced by a Judge under the preponderance of the evidence standard. The sentencing Judge found that the Petitioner had dealt 29.05 kilograms or more of methamphetamine, substantially more than the 500 grams or more to which he had pled guilty. This raised

his base offense level from 32 to 38. The sentencing Judge also adjusted the offense level upward by 3 points for the Petitioner's alleged role in the offense. Neither of these two findings of fact were submitted to a jury nor proven beyond a reasonable doubt.

Indeed, the sentencing court sentenced the Petitioner as follows. Assuming that Herrera-Aguilar was guilty of distributing and possessing with intent to distribute 29.05 kilograms of cocaine, the base offense level was 38, with an adjustment for role in the offense pursuant to U.S.S.G. § 3B1.1 of 3, a 2 level adjustment for obstruction of justice, for an adjusted offense level of 43. R. 126-33; PSI-3-4. With a 2 level downward adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a), and a 1 level downward adjustment for timely notification of intent to plead guilty pursuant to U.S.S.G. § 3E1.1, the total offense level was 40. R. 126-33; PSI-4. With a criminal history category of 1, Herrera-Aguilar's guidelines range was 292 to 365 months imprisonment. R. 126-34.

However, Franco Herrera-Aguilar only pled guilty to distributing and possessing with intent to distribute 500 grams or more of methamphetamine. R. 112. Herrera-Aguilar objected to the amount of drugs (29.05 kilograms) attributed to him. PSI – Addendum; R. 126-4-7. The Petitioner also objected to an enhancement for his role in the offense. PSI Amended Addendum. Thus, his base offense level should have been 32, with a 2 level adjustment for obstruction of justice, for an adjusted offense level of 34. With a 2 level downward adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a), and a 1 level downward adjustment for timely notification of intent to plead guilty pursuant to U.S.S.G. § 3E1.1, the total offense level should have been 31. With a

criminal history category of 1, Herrera-Aguilar's guidelines range should be 108 to 135 months. U.S.S.G. – Sentencing Table.

During sentencing, the government called only one witness – Police Officer James. As argued in Herrera-Aguilar's Appeal and Reply Brief, James repeatedly: 1. made out-of-court statements admitted for the truth of the matter asserted, which were, by definition, hearsay; 2. James never said that he had interviewed the witnesses for whom he was allegedly speaking; and 3. it was never established that the witnesses for whom James was allegedly speaking were unavailable to testify. Thus, the reasons that James' testimony concerning alleged drug amounts dealt by Herrera-Aguilar is inadmissible and constitutes hearsay are clearly over-determined.

Defense counsel thus objected to all of this Police Officer's testimony on hearsay grounds. R. 126-22. Defense counsel also objected that the case against the Petitioner, to the length and depth alleged by the government, had not been sufficiently proven. R. 126-32. The attorney for the Petitioner later renewed his objections. R. 126-39. In addition, in the PSI Report, the Petitioner objected to the amount of drugs and upward adjustment for role that were attributed to Herrera-Aguilar. PSI – Addendum.

Furthermore, during sentencing, the Judge misstated the amount that Herrera-Aguilar was accused of dealing by saying it was 59.05 kilograms of methamphetamine. R. 126-4. Thus, the sentencing Judge was clearly erroneously laboring under the impression that the amount of drugs attributed to the Petitioner was more than double the amount of 29.05 kilograms erroneously attributed to Herrera-Aguilar by the probation officer, and objected to by the Petitioner. PSI-3;

R. 126-4. In its Order, the Eleventh Circuit held that the sentencing Judge did not commit plain error when making this misstatement, however. App. 8, footnote 2.

As argued in Petitioner's Appeal and Reply Brief, the PSI Report's conclusory statements concerning alleged methamphetamine amounts and Herrera-Aguilar's alleged role in the offense are insufficient. Since Police Officer James' testimony is inadmissible hearsay, the sentencing records have not established the facts required to support Herrera-Aguilar's sentence, with its upward adjustments for alleged drug amount and role. In his Appeal, the Petitioner also argued that: 1. the attribution of a drug amount to Herrera-Aguilar from a date prior to the earliest date charged against him in Count One of the Indictment and 2. allegations that he dealt cocaine, rather than methamphetamine, as charged in the Indictment, should not be attributed to him. In its Order, the Eleventh Circuit either rejected, or did not expressly address, these arguments. App. 1-9.

The district court's sentencing of the Petitioner and findings of fact about drug amount and role in the offense under a preponderance of the evidence standard and pursuant to advisory guidelines pursuant to *Booker* are procedurally correct. *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). However, Herrera-Aguilar submits that *Booker* was wrongly decided, and that a sentence reached pursuant to this holding, in fact, actually violates a defendant's Sixth Amendment rights. *Id.*

In *Cunningham*, the constitutionality of California's sentencing scheme (the DSL) was at issue. *Cunningham v. California*, 127 S. Ct. 856 (2007). This Court held that:

"[b]ecause the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." *Id.* at 876.

In his dissent, Justice Alito notes that this Court cannot reach this conclusion unless it is ready to overrule the remedial decision in *Booker*. *Id.* at 887. This is a constitutionally sound argument, because the current reasonableness review under advisory guidelines implicitly creates a "statutory maximum" sentence, since " . . . [f]or each statutory offense, there must be a sentence that represents the least onerous sentence that can be regarded as reasonable in light of the bare statutory elements found by the jury." *Id.* at 886.

However, the Sixth Amendment jury-trial guarantee prohibits a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002); *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). "The relevant 'statutory maximum,'" this Court has clarified, "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S., at 303-304, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (emphasis in original). "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable

doubt, not merely by a preponderance of the evidence." *Cunningham v. California*, 127 S. Ct. 856, 868, 166 L. Ed. 2d 856 (2007).

Thus, in this case, the Sixth Amendment jury-trial guarantee has been violated, as the bare statutory elements as pled to by the Petitioner initially subjected him to a guidelines range sentence of just 108 to 135 months imprisonment. This guidelines range, Herrera-Aguilar submits, in line with Justice Alito's reasoning in *Cunningham*, is "implicit[ly]" the "statutory maximum sentence", as it represents the bare statutory elements of the offense to which the Petitioner pled guilty. *Id.* at 886-887.

With additional findings by the sentencing Judge under this preponderance of the evidence standard about drug amount and the Petitioner's alleged role in the offense, Herrera-Aguilar's guidelines range was raised to 292 to 365 months imprisonment, however. The facts exposing the Petitioner to this greater potential sentence were not found by a jury and established beyond a reasonable doubt, but merely by a preponderance of the evidence. Thus the Petitioner's Sixth Amendment jury trial rights have been violated by the sentencing procedure. In addition, since there are strong arguments that the facts and conclusions on which the Petitioner's sentence were based were insufficient even under a preponderance of the evidence standard, as argued in Herrera-Aguilar's Appeal and Reply Brief and noted in this Petition, this case is a good vehicle for this Court to remedy the aforementioned constitutional infirmity.

This issue is of national importance because it is an error of constitutional magnitude, and thus all defendants'

rights are implicated by the decision in this case. Certiorari should therefore be granted.

CONCLUSION

This Court should grant review of this case to decide an important question of national importance, namely whether the district court violated the Sixth Amendment right to a jury trial because it adjusted or enhanced the Petitioner's sentence through a preponderance of the evidence standard based on his alleged role, and made a factual determination as to the amount of drugs involved in the offense by the same standard, without submitting the issue to the jury to be determined beyond a reasonable doubt. This issue is of national importance because it is an error of constitutional magnitude, and thus all defendants' rights are implicated by the decision in this case. Certiorari should therefore be granted.

Date: March 5, 2007

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-12180
Non-Argument Calendar

D.C. Docket No. 03-00140-CR-T-26-TBM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCO HERRERA-AGUILAR,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(September 29, 2006)

Before DUBINA, HULL and MARCUS, Circuit Judges.

PER CURIAM:

Franco Herrera-Aguilar appeals the 292-month sentence he received after pleading guilty to conspiring to possess with intent to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(A)(viii). On appeal, Herrera-Aguilar argues that, in calculating his offense level, the district court erred by assessing a three-level managerial-role

enhancement under U.S.S.G. § 3B1.1, and in calculating the amount of methamphetamine for which he was accountable under U.S.S.G. § 2D1.1(c). Herrera-Aguilar also asserts that his sentence was unreasonable, particularly when compared to the sentences of his co-defendants. After careful review, we affirm.

We review the district court's interpretation of the Guidelines *de novo* and its factual findings for clear error. *United States v. Jordi,* 418 F.3d 1212, 1214 (11th Cir. 2005). We review the district court's determination of a defendant's role in the offense for clear error. *United States v. Yates,* 990 F.2d 1179, 1182 (11th Cir. 1993). We likewise review for clear error a determination of the amount of drugs attributable to a defendant in calculating his base offense level. *United States v. Simpson,* 228 F.3d 1294, 1298 (11th Cir. 2000).

Pursuant to the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220 (2005), we review a district court's sentence, imposed after consulting the Guidelines and considering the factors set forth at § 3553(a), for reasonableness. 543 U.S. at 264-65; *United States v. Williams,* 435 F.3d 1350, 1353 (11th Cir. 2006) ("Under *Booker,* we review a defendant's ultimate sentence for reasonableness."). The reasonableness review is "deferential" and focuses on whether the sentence imposed fails to achieve the purposes of sentencing as stated in § 3553(a). *United States v. Talley,* 431 F.3d 784, 788 (11th Cir. 2005). Moreover, we recognize that a range of reasonable sentences exists from which the district court may choose. *Id.* "[T]he party who challenges the sentence bears the burden of establishing that the sentence is unreasonable in the light of both [the] record and the factors in section 3553(a)." *Id.*

The relevant facts are these. On April 10, 2003, Herrera-Aguilar was indicted, along with co-defendant Sigifredo Saucedo, for conspiring to possess with intent to distribute 500 grams or more of methamphetamine (Count One), in violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(A)(viii), and, along with co-defendant Luis Arana Aguilar, for conspiring to possess with intent to distribute 500 grams or more of cocaine (Count Two), in violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(B)(ii). Herrera-Aguilar pled guilty to Count One, after which the district court dismissed Count Two, pursuant to the government's motion. Herrera-Aguilar then proceeded to sentencing.

According to the presentence investigation report ("PSI"), beginning in at least April of 1999, Herrera-Aguilar recruited and paid numerous couriers to transport methamphetamine and other drugs from California to Florida. The PSI listed the two co-defendants with whom Herrera-Aguilar had been indicted, as well as other defendants related to the conspiracies with which Herrera-Aguilar was charged, as receiving the following sentences: (1) Luis Arana Aguilar, 37 months' imprisonment; (2) Sigifredo Saucedo, 46 months' imprisonment; (3) Ramon Luna-Magana, 262 months' imprisonment; (4) Andres Agustin Lujano, 60 months' imprisonment; (5) Alejando Benitez, 294 months' imprisonment; (6) Francisco Patino Vega, 204 months' imprisonment; (7) Jesus Hernandez, 168 months' imprisonment; and (8) Fragedis Almada-Escobar, who remained a fugitive.

The PSI detailed the arrests of some of Herrera-Aguilar's co-conspirators, many of whom identified Herrera-Aguilar as their supplier. In 2000, Saucedo was stopped in Oklahoma for a traffic violation, and 6.1 kilograms of methamphetamine were found in his vehicle.

After his arrest, Saucedo said that he was transporting the methamphetamine for Herrera-Aguilar. In June 2001, law enforcement stopped Lujano, who was found to be transporting 13.6 kilograms of methamphetamine from Texas to Florida and identified Herrera-Aguilar as his supplier. In July or August 2001, another 9.07 kilograms of methamphetamine was seized from Luna-Magana, who also identified Herrera-Aguilar as his supplier. Finally, in March 2003, during the search of a residence that Saucedo maintained for Herrera-Aguilar, 283.5 grams of methamphetamine were discovered, among other controlled substances. Herrera-Aguilar fled the residence when the police officers arrived. In April 2004, Herrera-Aguilar was arrested in Georgia for traffic violations after leading police officers in a high-speed chase on an interstate highway and through an apartment complex.

After determining that over 29.05 kilograms of methamphetamine were seized from Herrera-Aguilar's co-conspirators, the PSI calculated Herrera-Aguilar's base offense level as 38, pursuant to U.S.S.G. § 2D1.1(c), which applies to offenses involving 15 kilograms or more of methamphetamine. The PSI assessed a four-level leadership-role enhancement, pursuant to U.S.S.G. § 3B1.1(a), and a two-level enhancement, pursuant to U.S.S.G. § 3C1.2, for obstructing justice because Herrera-Aguilar recklessly created a risk of death or injury to another during flight. Herrera-Aguilar also received a three-level reduction for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1(a) and (b). With a total offense level of 41 and a criminal history category II, Herrera-Aguilar faced 360 months' to a life term of imprisonment, under the Guidelines range. The mandatory minimum term for his

offense was ten years in prison. *See* 21 U.S.C. §§ 846 and 841(b)(1)(A)(viii).

Before the sentencing hearing, Herrera-Aguilar filed written objections to being held accountable for 29.05 kilograms of methamphetamine and to receiving a leadership-role enhancement. He also argued that he should have received a mitigating-role reduction. The district court heard argument on these objections at the beginning of the hearing. The government then called Glen James, a police officer with the City of Lakeland Police Department who was assigned as a task force officer with the Drug Enforcement Agency ("DEA").

Officer James testified that he was assigned to investigate Herrera-Aguilar in June 2001. James described the stop of Lujano that month. This stop yielded the discovery of 24.7 kilograms of methamphetamine, which Lujano said was supplied by Herrera-Aguilar, and during a subsequent controlled delivery of this methamphetamine to Benitez's house, another 19.7 pounds of methamphetamine was discovered. Law enforcement subsequently recorded a conversation, which took place in a police car between Lujano and co-conspirators Vega and Almada-Escobar after they were arrested in conjunction with the methamphetamine discovered in Benitez's house. During this conversation, the conspirators discussed the need to contact Herrera-Aguilar.

Officer James also described the arrests of co-conspirators Luna-Magana, Saucedo, and Cabrera-Balbuena, all of whom identified Herrera-Aguilar as their supplier. The methamphetamine involved in these arrests exceeded 46 pounds. And Herrera-Aguilar's fingerprints were lifted off of the packaging of the methamphetamine seized from

Cabrera-Balbuena and the bumper of the car he was driving.[1]

The district court overruled Herrera-Aguilar's objections to the PSI's calculations, except for adjusting the leadership-role enhancement from the four levels recommended in the PSI to three levels. The district court then found that Herrera-Aguilar's criminal history warranted a category I, rather than a category II. After these adjustments, Herrera-Aguilar's Guidelines imprisonment range was 292 to 365 months' imprisonment. Herrera-Aguilar requested a sentence below, or at the low end of, the range, arguing that such a sentence would sufficiently deter future crime and that he was a "good family man" who did not have a significant prior record. The government responded that 360 months would be an appropriate sentence because of the large amount of methamphetamine involved. Before

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[1] We are unpersuaded by Herrera-Aguilar's argument that James's testimony was inadmissible hearsay because it was based primarily on cooperating co-conspirators' statements. The district court may use reliable hearsay at sentencing. *United States v. Cantellano*, 430 F.3d 1142, 1146 (11th Cir. 2005), *cert. denied*, 126 S.Ct. 1604 (2006). Factors that lend reliability include whether witnesses' statements are consistent and whether the defendant has had the opportunity to rebut the evidence or otherwise cast doubt upon its credibility. *United States v. Gordon*, 231 F.3d 750, 760 (11th Cir. 2000); *United States v. Castellanos*, 904 F.2d 1490, 1496 (11th Cir. 1990). A witness's "cooperation with the Government, without more, does not prohibit the judge from relying on the statement." *United States v. Riley*, 142 F.3d 1254, 1258 (11th Cir. 1998) (footnote omitted). Because cooperation alone is insufficient to suggest inadmissibility, and we find that James's testimony included the necessary indicia of reliability – the co-conspirators' statements consistently indicated that Herrera-Aguilar was the supplier and directed the transportation of the methamphetamine, and Herrera-Aguilar extensively cross-examined James and established that some of his sources received lesser sentences in exchange for their cooperation – the district court did not err by considering it at sentencing.

imposing sentence, the district court reviewed co-conspirators' sentences imposed by another judge, noting that Luna-Magana was sentenced to 262 months' imprisonment, Benitez was sentenced to 294 months' imprisonment and did not cooperate with the government, and Vega received 204 months' imprisonment and did not cooperate with the government. The district court also noted that other co-conspirators who did cooperate were sentenced to "significantly less time" in prison. The district court then sentenced Herrera-Aguilar to 292 months' imprisonment, to be followed by 5 years of supervisory release, stating that the sentence was consistent with those imposed on Herrera-Aguilar's co-conspirators by another judge. This appeal followed.

First, Herrera-Aguilar challenges the district court's calculation of the advisory Guidelines range, asserting that the court improperly assessed a managerial-role enhancement and miscalculated the amount of methamphetamine involved. Pursuant to U.S.S.G. § 3B1.1(b), the district court may apply a three-level enhancement if the defendant was a "manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants." *See* United States Sentencing Commission, *Guidelines Manual,* § 3B 1.1(b) (Nov. 2004). To warrant application of the enhancement, the defendant must have exerted "some degree of control, influence, or leadership" over at least *one* other participant. *See Yates,* 990 F.2d at 1182; U.S.S.G. § 3B1.1, comment. (n. 2). Here, we readily conclude the government met its burden to prove Herrera-Aguilar's managerial role by a preponderance of the evidence. *Yates,* 990 F.2d at 1182 (holding that government must prove defendant's role by a preponderance of the evidence). The government's evidence established that at

least five people were involved in the conspiracy, and that Herrera-Aguilar exercised authority over at least one of these people by paying and directing at least one co-defendant to transport methamphetamine and to maintain a methamphetamine-storage house.

Likewise, the district court did not reversibly err in its calculation of the drug amount. The Guidelines require a district court to hold a defendant accountable for all drugs foreseeably distributed as part of the common scheme for which he was convicted. *United States v. Hansley,* 54 F.3d 709, 713-14 (11th Cir. 1995) (citing U.S.S.G. §§ 2D1.1 and 1B1.3). The district court is required to make individualized findings on the scope of criminal activity undertaken by the defendant and then determine the drug quantities reasonably foreseeable in connection with that level of participation. *Id.* Where that drug quantity is 15 kilograms or more of methamphetamine, the defendant receives a base offense level 38. U.S.S.G. § 2D1.1(c)(1).[2] From our review, the government presented ample evidence that Herrera-Aguilar's participation in the conspiracy was extensive, and that he reasonably could have foreseen that the 29.05 kilograms of methamphetamine

[2] We are unpersuaded by Herrera-Aguilar's argument concerning a misstatement by the district court at the sentencing hearing. At one point during the hearing, the district court incorrectly stated that Herrera-Aguilar was responsible for 59.05 kilograms of methamphetamine, rather than the 29.05 kilograms seized from his co-conspirators and discussed in the PSI. Herrera-Aguilar did not object to this misstatement below, and accordingly, we review it for only plain error. *United States v. Simpson,* 228 F.3d 1294, 1298 (11th Cir. 2000). Because Herrera-Aguilar cannot show an affect on his substantial rights, the third prong of his burden under the plain error test – that is, under § 2D1.1(c)(1), the Guidelines imprisonment range would be the same using either of these amounts – there is no plain error.

seized from his co-conspirators might be distributed. Accordingly, the district court did not err in calculating the advisory Guidelines range on either of the rounds Herrera-Aguilar raises on appeal.

As for Herrera-Aguilar's challenge to the reasonableness of his sentence, the district court considered the following, which we consider pertinent to the 18 U.S.C. § 3553(a) factors: (1) the sentences imposed by another judge on similarly situated co-conspirators, *see* 18 U.S.C. § 3553(a)(6) ("the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"); (2) Herrera-Aguilar's status as a "good family man" with only a minor prior record, *id.* at § 3553(a)(1) (enumerating "the history and characteristics of the defendant"); (3) "the seriousness of the offense," *id.* at § 3553(a)(2)(A); (4) the need to protect the public, *id.* at § 3553(a)(2)(C) ("the need for the sentence imposed . . . to protect the public from further crimes of the defendant"); and (5) the parties' arguments and the PSI's calculations, which outlined "the kinds of sentences available," *id.* at § 3553(a)(3). After considering all of these factors, the district court imposed a sentence it concluded was consistent with those sentences given to similarly situated co-conspirators and within the Guidelines range. On this record, we readily conclude that Herrera-Aguilar's sentence was reasonable.

In sum, the district court correctly calculated the Guidelines range, considered the Guidelines advisory, and adequately took into account the factors in 18 U.S.C. § 3553(a), and we therefore affirm.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs.

FRANCO HERRERA-AGUILAR

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

CASE NUMBER: 8:03-cr-140-T-26TBM
USM NUMBER: 55794-019
Defendant's Attorney: Daniel Hernandez (cja)
(Filed Apr. 8, 2005)

THE DEFENDANT:

XX pleaded guilty to count One (1) of the Indictment.

___ was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY the court has adjudicated that the defendant is guilty of the following offenses:

TITLE & SECTION	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT NUMBER(S)
21 U.S.C. §846 and 841(b)(1)(A)(viii)	Conspiracy to Possess with Intent to Distribute and to Distribute 500 Grams or More of Methamphetamine	March 5, 2003	One (1)

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

___ The defendant has been found not guilty on count(s)

X Count Two (2) of the Indictment is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:
April 8, 2005

/s/ Richard A. Lazzara
RICHARD A. LAZZARA
UNITED STATES
DISTRICT JUDGE

DATE: April 8, 2005

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **TWO HUNDRED NINETY-TWO (292) MONTHS** as to Count One (1) of the Indictment.

XX The court makes the following recommendations to the Bureau of Prisons: The Coleman facility or Miami.

XX The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district.

___ at ___ a.m./p.m. on _____

___ as notified by the United States Marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

___ before 2 p.m. on _____.

___ as notified by the United States Marshal.

___ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By: _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) YEARS** as to Count One (1) of the Indictment.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state or local crime, and shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter not to exceed 104 tests per year.

___ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

XX The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the following standard conditions that have been adopted by this court and any additional conditions on the next page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instruction of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SUPERVISED RELEASE

___ The defendant shall also comply with the following additional conditions of supervised release:

___ The defendant shall participate in the Home Detention program for a period of ___. During this time, defendant will remain at defendant's place of residence except for employment and other activities approved in advance by the defendant's Probation Officer. Defendant will be subject to the standard conditions of Home Detention adopted for use in the Middle District of Florida, which may include the requirement to wear an electronic monitoring device and to follow electronic monitoring procedures specified by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such monitoring not to exceed an amount determined reasonable by the Probation Officer based on ability to pay (or availability of third party payment) and in conformance with the Probation Office's Sliding Scale for Electronic Monitoring Services.

___ The defendant shall participate as directed in a program approved by the Probation Officer for treatment of narcotic addiction or drug or alcohol dependency (inpatient or outpatient) which may include testing for the detection of substance use or abuse. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Substance Abuse Treatment Services.

___ The defendant shall participate as directed in a program of mental health treatment approved by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable to by Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Mental Health Treatment Services.

___ The defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, acquisitions or obligating himself/herself for any major purchases without the approval of the Probation Officer. The defendant shall provide the Probation Officer access to any requested financial information.

XX If deported, the defendant shall not reenter the United States without the express permission of the United States Department of Homeland Security.

XX The defendant shall cooperate in the collection of DNA as directed by the Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Total Restitution
Totals:	**$ 100.00**	**$ Waived**	**$ N/A**

___ The determination of restitution is deferred until _____. An *amended judgment in a criminal case* (AO 245C) will be entered after such determination.

___ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order of percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid in full prior to the United States receiving payment.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_____	$_____	

___ If applicable, restitution amount ordered pursuant to plea agreement $_____

___ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day

after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

___ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

___ the interest requirement is waived for the ___ fine and/or ___ restitution.

___ the interest requirement for the ___ fine and/or ___ restitution is modified as follows:

*Findings for the total amount of loses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A. _X_ Lump sum payment of $100 due immediately

___ not later than _____, or

___ in accordance with ___ C, ___ D, and/or, ___ E below; or

B. ___ Payment to begin immediately and continue to make payments to the best of your ability until this obligation is satisfied. If in custody you are directed to participate in the Bureau of Prisons Financial Responsibility Program if eligible, and upon your release from custody you shall adhere to a payment schedule as determined by the Probation Officer.

C. ___ Payment in ___ installments of $___ over a period of ___ months, to commence ___ days after date of this judgment.

D. ___ Payment in ___ installments of $___ over a period of ___ to commence ___ after release from imprisonment to a term of supervision; or

E. ___ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons "Inmate Financial Responsibility Program", are made to the Clerk of the Court, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

___ Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

___ The defendant shall pay the cost of prosecution.

___ The defendant shall pay the following court cost(s):

___ The defendant shall forfeit the defendant's interest in the following property to the United States.

___ Payments shall be applied in the following order: (1) assessment; (2) restitution principal (3) restitution interest (4) fine principal; (5) community restitution,

(6) fine interest; (7) penalties and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-12180-II

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANCO HERRERA-AGUILAR,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

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(Filed Dec. 5, 2006)

BEFORE: DUBINA, HULL and MARCUS, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/s/ Marcus
UNITED STATES CIRCUIT JUDGE

ORD-41